

DISCUSSION
DRAFT

EPA'S LOCAL GOVERNMENT ADVISORY COMMITTEE'S REPORT



6/22/2017

**Waters of the United States
2017 Report**

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Local
Government
Advisory
Committee



From the LGAC's Charter, defining general goals:

The LGAC is a policy-oriented committee. To assist the agency in ensuring that its regulations, policies, guidance and technical assistance improve the capacity of local governments to carry out these programs, the LGAC provides advice and recommendations to the EPA Administrator.

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"Water is the lifeblood of all our communities and our economic prosperity and we want to be good stewards of our Nation's water resource for now and the years to come. This is why having a clear and enforceable 'Waters of the U.S.' rule is so important to us. It also is important that it is financially sustainable and does not overreach, but affirms our goals to make our communities a better place to live and work for all of our citizens."

**Mayor Bob Dixon,
LGAC Chairman**

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"Clean, safe and affordable drinking water is a cornerstone of health, recreation and commerce. EPA has a critical role to create a facilitative, cooperative and collaborative regulatory environment in which local, tribal, state and the federal partners work together to protect one of our nation's most important resources."

**Susan Hann,
LGAC Water Workgroup Chairwoman**

38

EPA's Local Government Advisory Committee's Report

WATERS OF THE UNITED STATES 2017 REPORT

Executive Summary

I. Introduction and Background

A. EPA's Proposed Waters of the U.S. Rule

B. Committee Charge

C. Historical Context

II. Waters of the U.S. and Local Governments

A. Waters: Our Nation's Wealth and Health

B. Local Governments and Cooperative Federalism

C. Clarity and Predictability

D. Flexibility and Regionalization

E. Enhanced State and Local Government Role

F. Scalia Approach: Challenges and Opportunities

G. Exemptions

H. Permitting Reform

I. Agriculture and Rural Communities

J. Outreach to Local Governments

K. Financial Sustainability

III. Response to Charge: Findings and Recommendations

IV. Conclusion

V. Appendix



Sawtooth Mountains, South Stanley, ID - Photo Source: Eric Vance, EPA

EXECUTIVE SUMMARY

The EPA Administrator issued a compelling charge to the Local Government Advisory Committee that provided an opportunity for local, tribal and state governments to advise the EPA regarding Waters of the United States. The LGAC Waters of the United States Report 2017 provides both policy perspective and specific responses to the charge that can help guide the EPA in moving forward with rulemaking.

Clean, safe and affordable drinking water is vital to the health and prosperity of our communities. As local, state and tribal representatives, the LGAC is committed to this mission in philosophy and action. The report includes several thematic concepts:

- Local, tribal and state governments are partners in the mission to provide and preserve clean, safe and affordable drinking water. We connect with citizens and know our unique communities. Armed with this knowledge, we can act locally in the interest of clean water.
- Clarity and predictability are paramount to success. The lack of clarity and predictability are serious challenges to effectuating any rulemaking process. Clear definitions and criteria are needed for jurisdictional determinations rather than interpretations. Simplifying the jurisdictional determination process is one of the most important steps.
- Flexibility and consideration of regional differences are needed. Several examples of potential regional exemptions are included in the report.
- There are opportunities to enhance state and local roles. Local and state governments want to be engaged and can do so with the appropriate resources through State Assumption of the 404 program or State Programmatic General Permits.
- Regulatory reform should include incentives for best practices including green infrastructure, stormwater management systems, agricultural innovation and other evolving innovations. Exemptions for activities that clearly have a net positive impact need to be considered.
- The permitting process must be more predictable. Jurisdictional determinations of yes, nor or maybe within a definitive time frame such as 60 days would be a tremendous improvement. Technology, including mapping, and other innovations, can improve efficiency and effectiveness. Utilizing the 2008 guidance (with definitional changes) can be a good foundation for jurisdictional determinations.
- Source water protection remains a primary concern as this is the foundation of the nation's drinking water system and health of our communities. Ultimately, a community's ratepayers absorb the cost of treating source water, which can become unmanageable as source water quality deteriorates.
- Affordability is a universal theme heard across the nation. Whether it is the cost of source water treatment, compliance costs and penalties, infrastructure development or a myriad of other costs – the ability of citizens to pay must be considered in the equation. If a community cannot develop an affordable rate structure, then citizens do not truly have access to clean, safe drinking water.

In summary, the LGAC Waters of the United States 2017 report delivers a series of recommendations that can assist EPA in evolving the regulatory framework in a way that collaborates with local governments, improves efficiency and effectiveness and advances the goal of clean, safe and affordable drinking water for our communities.

I. Introduction and Background

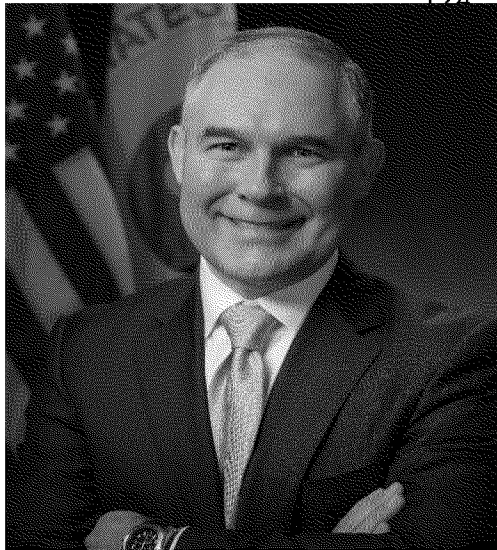
A. EPA'S PROPOSED WATERS OF THE U.S. RULE

On February 28, 2017, the President signed the Executive Order on *Restoring the Rule of Law, Federalism, and Economic Growth* by Reviewing the "Waters of the United States" Rule (issued June 2015).¹ The Executive Order gives direction to the EPA Administrator and the Assistant Secretary of the Army for Civil Works to review the final Clean Water Rule (CWR) and "publish for notice and comment a proposed rule rescinding or revising the rule." The E.O. also directs that EPA and the Army "shall consider

interpreting the term 'navigable waters' in a manner "consistent with Justice Scalia's opinion in *Rapanos* ²which includes relatively permanent waters and wetlands with a continuous surface connection to relatively permanent waters.

As part of EPA's efforts to consult with state and local government officials, EPA's Local Government Advisory Committee (LGAC) is providing its recommendations to the Administrator on revising the definition of "Waters of the United States" (WOTUS) and identifying ways to reduce the regulatory burden on local communities as well as balance that with environmental protection.

On April 10, 2017, EPA Administrator Scott Pruitt sent out a solicitation for input on the forthcoming proposal to rescind and revise the definition of waters of the United States. ³Seeking input from state, local and tribal government officials is an important



The Honorable Scott Pruitt, EPA Administrator

"We greatly look forward to the opportunity to sit at the table with our state and local partners from across the country to discuss the rule and develop an approach to address this significant issue while keeping States at the forefront of our mission."

Honorable Scott Pruitt, Administrator, EPA

step for the EPA in the process prior to proposing regulations that may have implications on federalism as defined by the EPA's policy for implementing the order.

The LGAC's charge is also an opportunity to hear from state, local and tribal partners from across the country on approaches to consider for a WOTUS rule and other significant issues to be considered in developing and implementing a revised WOTUS rule.

¹ <https://www.whitehouse.gov/the-press-office/2017/02/28/presidential-executive-order-restoring-rule-law-federalism-and-economic>

² *Rapanos v. United States*, 547 U.S. 715 (2006) 126 Supreme Court 2208; 165 LEd. 2d 159

³ Clean Water Act
Fed. Reg. 37,054 (June 29, 2015)).

The agencies intend to follow an expeditious, two -step process that will provide certainty across the country: 1) an initial rulemaking to rescind the 2015 rule and reinstate the regulatory approach that, except for a brief two -month period prior to the 6th Circuit stay of that rule, has been the law in place since 1986, and thus maintains the status quo, and 2) promulgation of a revised definition of waters of the U.S. consistent with direction in the February 28, 2017, E.O.



"Our goal is to help the EPA be a better partner with State administrators and policy-makers to better achieve our shared objectives: protecting the waters of the U.S. and protecting the economic interests of Americans."

State Representative Tom Sloan, Kansas

State Representative Tom Sloan, Kansas

B. COMMITTEE CHARGE

As part of EPA 's efforts to consult with state and local government officials, EPA 's Local Government Advisory Committee (LGAC) puts forth our recommendations to the Administrator on revising the definition of "Waters of the United States" (WOTUS) and identifying ways to reduce the regulatory burden on local communities as well as balance that with environmental protection.

"EPA Administrator Pruitt gave the LGAC a great opportunity to provide broad input not only on proposed rules, but also on their effective implementation.

'Waters of the US' rule is particularly challenging, but the LGAC embraced the charge, by providing our unique perspective to better help clarify, define and protect our important water resources across America."

Jeff Witte,
Secretary, New Mexico Department of
Agriculture



Jeff Witte, Secretary, New Mexico Department of
Agriculture

The LGAC consists of 35 local, state and tribal government elected and appointed officials representing cities, parishes, counties, municipalities, and other local political jurisdictions. Local officials are knowledgeable and provide unique perspectives on issues relating to a revised rule. Further, the LGAC offers balanced views from diverse on-the-ground perspectives.

Through a collaborative process, the LGAC was charged to provide Administrator Pruitt with expeditious and meaningful advice relating to a revised "Waters of the U.S." rule. Overall, the goal is to provide recommendations on approaches the EPA should consider when considering a revised rule.

"My City Aurora Colorado appreciates the EPA's efforts reach out local communities to gather comments for potential approaches to the WOTUS rule." Council Member Brad Pierce



Council Member Brad Pierce, Aurora, CO

This Report highlights our findings and recommendations from our unique local government perspective which will assist the agency in providing insights from this perspective to help shape a revised rule that will better promote cooperative federalism and also provide our perspectives on the best means to communicate a revised rule with state, local and tribal governments.

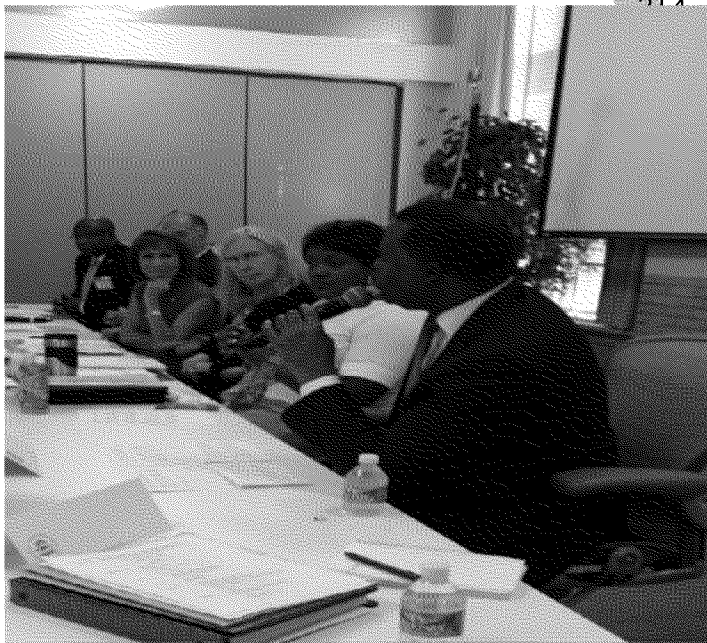
B. HISTORICAL PERSPECTIVE

Congress enacted the Clean Water Act (CWA) in 1972 [33 U.S.C. §§1251 to 1387] to prevent the pollution of waters of the United States, including waters not deemed traditionally "navigable" such as streams, lakes, and wetlands. Since then, the CWA has been instrumental in protecting public health and the environment. However, Supreme Court decisions in 2001 and 2006 interpreted the Clean Water Act in ways that changed the approach for determining whether a water body was protected under the Act.

The Supreme Court's decisions shifted focus away from potential effects on interstate commerce, and towards connectivity among waters and potential effects of a water on the integrity of downstream navigable waters. The intent of the proposed rule was to clarify what waters were covered under the Clean Water Act. Following Supreme Court decisions in 2001 and 2006, determining protection for streams and wetlands became more complex. Requests for a rule to provide clarity came from Congressional members, state and local officials, industry, agriculture, environmental groups and the public.

In May 2014, the LGAC undertook an extensive analysis and collaboration to provide recommendations to the EPA on the 2015 Waters of the U.S. Rule. The U.S. Environmental Protection Agency and the U.S. Army Corp of Engineers proposed a joint rule (2014) to clarify the definition of "waters of the United States" in the 1972 Clean Water Act. It was published in the Federal Register on April 21, 2014 [79 Fed. Reg. 22,188] with a public comment period that was extended twice to close on November 14, 2014. In response to the May 2014 Charge, the LGAC held four face to face public meetings from across the country to engage local officials regarding the proposed rule. The goal of these public meetings was to hear input and develop recommendations for the EPA to consider in promulgating a final rule. To engage a wide range of officials, the meetings were held in diverse geographical regions: St. Paul, Minnesota; Atlanta, Georgia; Tacoma, Washington; and Worcester, Massachusetts.

We would like to recognize the efforts of those on LGAC. Your work on the "Waters of the U.S." rewrite was thoughtful and insightful. On behalf of the NACo, we thank you for your dedication, time and ongoing commitment to these efforts!
Julie Ufner, National Association of Counties (NACo)



The LGAC heard from diverse viewpoints from individuals of local, state and tribal representatives. These perspectives were deliberated and incorporated in a Report for the EPA to consider entitled, "*Initial Findings and Recommendations Pertaining to EPA's Clean Water Act Waters of the U.S. Proposed Rule.*"⁴

The LGAC heard many concerns expressed across the country regarding clarity, sufficient time to give input; regulatory delays and the costs (financial and resources) of implementation. Despite some changes to the final rule as a result of the public comments and some LGAC recommendations incorporated, the 2015 final rule still lacked clarity and was contested by states, industry and organizations. Some members felt that EPA's detailed response to comments would demonstrate to participants that their concerns were heard and acknowledged. Other members felt that the public, and especially those involved in the LGAC public outreach, should have the opportunity to comment on a substantially revised rule. The LGAC concluded that it was (and remains) important to EPA's credibility to be responsive to the concerns of local governments expressed through the public outreach process.

LGAC 2014 Meeting, Atlanta, GA, Mayor Kasim Reed

⁴ https://www.epa.gov/sites/production/files/2015-10/documents/11.5.14_w.o.t.u.s._report.pdf

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II. Water and Our Communities

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A. Water: Our Nation's Health and Wealth



Water resources are the lifeblood for our nation's cities, towns and small rural communities. It is essential for the health, prosperity and security for our citizens and is among the top priorities for us in local governments. As State, local and tribal government partners we desire to manage our water resources so that we have reliable and safe water supplies to create jobs, attract industry and investment, and provide for the health and welfare of citizens. A common understanding of the value of water and how it impacts the health and prosperity of us at

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Evening barge trip on the Mississippi River near downtown Saint Paul, MN.

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Photo Source: Davin Brandt, Ramsey County, MN

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the local level is important for governmental decision-making. For example, water infrastructure costs are

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estimated to be \$100 per household per year, for smaller communities, these same costs are \$400 to

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\$800 more per year.⁵ Estimates range for every \$1 million investment in water infrastructure it supports

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between 15 and 18 jobs throughout the

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economy. Disruption in our nation's Therefore,

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protections under the Clean Water Act for the

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117 million people (one third of Americans)

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that rely on these waters as part of our public

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drinking water assets are local decisions of public trust and stewardship.

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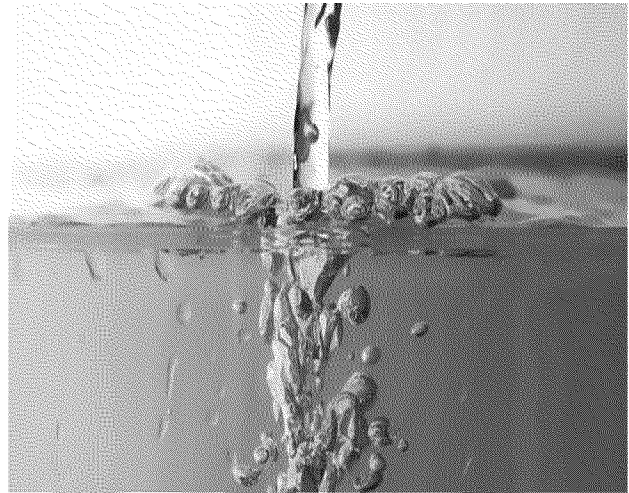
Our communities depend on water for economic progress.

⁵ <http://www.nerwa.org/gwnews/db212.pdf>, The Value of Water and the Water Operator, by Doug Buresh, Circuit Rider #3

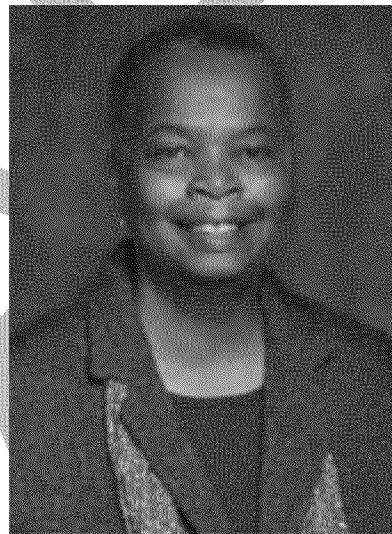
Protecting our rivers, lakes, streams and wetlands and keeping them healthy and safe is the responsibility of all levels of government. At the same time costs of treatment should not be transferred to the directly to rate payer - *at the tap*.

B. Local Governments and Cooperative Federalism

The Clean Water Act (CWA) as amended in 1972, established the basic structure for protecting our nation's water resources by regulating pollutant discharges into the waters of the United States. Clean Water Act programs are largely federal, state and tribal programs.



In Portland, Maine, we're lucky to have water resources at our door step. Water is vital to our regional economy and way of life. Therefore, our city and regional stakeholders collaborate with state and national partners to ensure we keep our rivers, streams, and bays clean. Everyone plays an important role!
Councilor Jill Dusen, Portland, ME



Councilor Jill Dusen, Portland, ME
and Vice-Chair of the LGAC

The Clean Water Act applies to "navigable waters," defined in the statute as "waters of the United States." On February 28, 2017, the President of the United States issued an Executive Order directing EPA and Department of the Army to review and rescind or revise the 2015 Rule. The EPA and the U.S. Army Corps of Engineers are in the process of considering a revised definition of "Waters of the United States" consistent with the Executive Order. Local governments support a straight-forward rulemaking process, inclusive of the tenants of cooperative federalism. This approach acknowledges the shared responsibility of state and local governments in the governance and cooperation to work out details of responsibility.

The CWA Section 404 is jointly administered by EPA and the Corps of Engineers and regulates discharges of dredged or fill materials into Waters of the United States, including wetlands. CWA Section 404 is largely federal with the exception of a small number of State Assumed 404 Programs (Michigan and New Jersey). If empowered, states and tribes could play an increased and more efficient

role in managing the program. Local governments too, have a strong role to play and can be key strategic partners in protecting our nation's water resources. Local governments manage broader water quality protection efforts such as managing stormwater, flood protection and enhanced watershed protection along with protecting the sources of drinking water.

Local governments have the tools to strengthen wetland and stream protection efforts that better support community goals with greater protection for the resource. Integrated Planning (IP) offers municipalities the opportunity to meet multiple Clean Water Act requirements by sequencing separate wastewater and stormwater programs while maximizing investments so that the highest priority projects come first. EPA, states, and municipalities have achieved progress in implementing IP approaches while addressing the most serious water quality issues in order of priority to protect public health and the environment.

"We should be gravely concerned about the minimization of the federal role in the Clean Water Act. Any changes at the federal level must be accompanied by the commitment and action to enhance protection by state and local officials. This requires frank discussion given the financial challenges faced by some local communities and states."

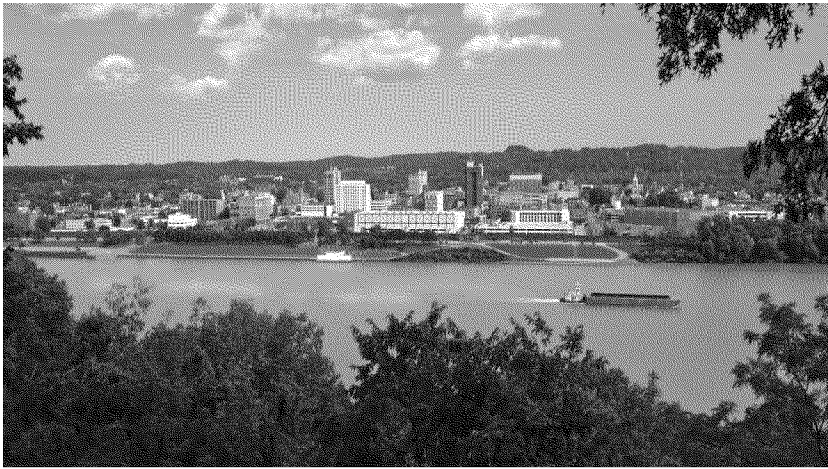
Mayor Karen Freeman-Wilson, Gary, IN



Mayor Karen Freeman-Wilson, Gary, IN

Clarity and Predictability

A central theme heard by the LGAC in public meetings of state, local and tribal government officials on the 2015 'Waters of the U.S.' rule is that definitions were too broad or confusing and were subject to interpretation through litigation. Key terms used in the WOTUS rule are vague such as "uplands," "tributary," "floodplain," "significant nexus," "adjacent," and "neighboring" but are also important in defining what waters are jurisdictional. These terms are either broadly defined, or not defined at all which has led to further confusion, not less, over what waters fall within federal jurisdiction. Local governments need a rule that puts forward clear definitions and provides examples and graphics for further clarity. Without this clarity, it could lead to further unpredictability and result in unnecessary project delays, subjective judgements and inconsistency across the country.



D.Flexibility and Regionalization

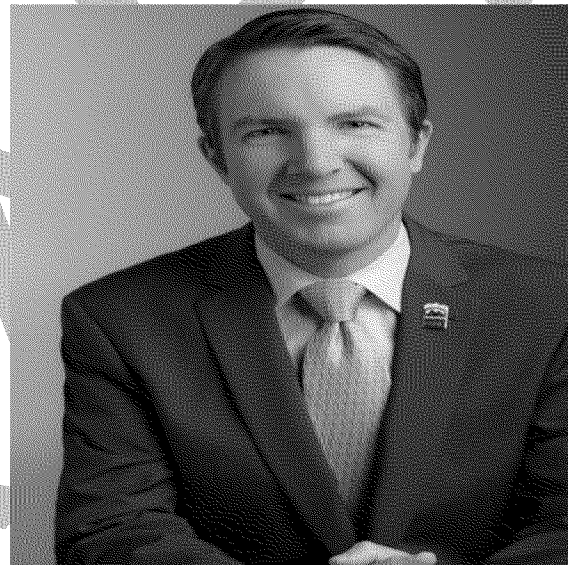
In fomulating a revised 'Waters of the U.S.' rule it should have flexibility and reflect natural and regional variability of our nation's waters. As a basic approach, criteria could be established that recognizes natural ecoregions (delineated on the basis of natural and anthropogenic factors) to recognize geographic variability

336 Ohio River, City of Huntington, West Virginia
337 Photo Source: Huntington Quarterly

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"In the West, water quantity is a challenge, but quality is equally important. Protecting watershed health of the eastern Sierra is crucial to northern Nevada local communities."

**Council Member David Bobzien,
Reno, NV**



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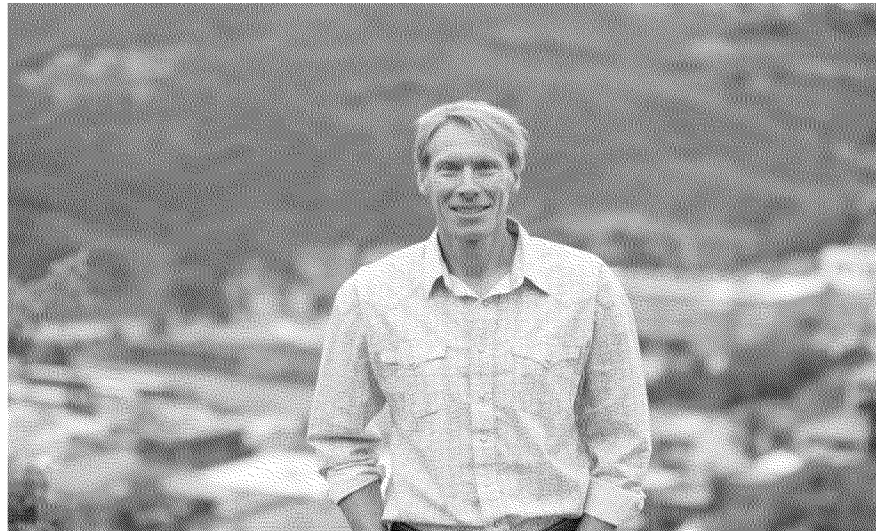
Council Member David Bobzien, Reno, NV

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342 among regions. States and tribes should have further input in this process to modify or improve on this
343 basic approach. Workgroups made up of federal, state and local officials could help establish local
344 delineation factors characteristic of these regional waterbodies such as western ephemeral streams, and
345 regional waterbodies such other unique wetlands such as pocosins, Carolina bays etc. should be factored.

“Park City is a small western community of 8,000 with big water challenges. We work closely with our EPA Region 8 office to help solve our water issues. The EPA is not just a regulatory agency, but is an essential resource to help us address our legacy mining issues and its environmental impacts.” Council Member Andy Beerman, Park City, UT

delineation factors characteristic of these regional waterbodies such as western ephemeral streams, and other unique wetlands such as pocosins, Carolina bays etc. should be factored.



Council Member Andy Beerman, Park City, UT

Western arid streams may need further regional determinations as whether these areas are washes and otherwise dry channels characterized by irregular (not seasonal) ephemeral flows or may actually qualify as waters of the United States. These jurisdictional calls of WOTUS should be the exception rather than the rule. Also, wetlands and streams in the State of Florida also should be considered in separate regional guidance since most of the State could be classified as a Waters of the U.S. due to high groundwater tables and surface connections with waters of the U.S.



Homestake Reservoir – Pitkin and Eagle Counties, Colorado
Photo Source: City of Aurora, CO



Back Cove runner with Portland ME skyline
Photo Source: Corey Templeton Photography

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370 C. Enhanced State and Local Government Role

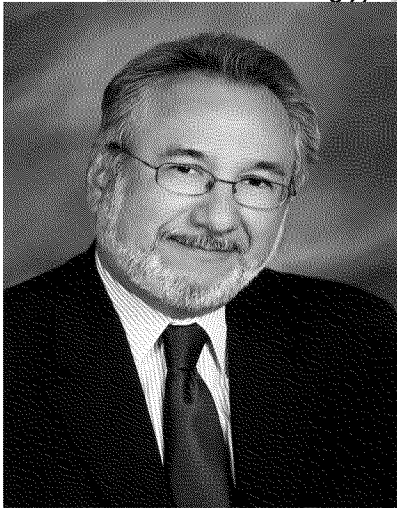
371 States play a vital role in the protection of wetlands by addressing waters and activities that *are not*
 372 regulated under the Section 404 program, or by imposing additional limits on activities that *are*
 373 regulated under that program. Pursuant to Section 404(g) of the Clean Water Act, a state can *assume* the
 374 authority to issue permits for the discharge of dredged or fill material into waters regulated under the
 375 Clean Water Act *other than traditional navigable waters or waters seaward of the high water mark*. See 33
 376 U.S.C. § 1344(g). EPA's regulations also authorize tribes to assume Section 404 permitting authority within
 377 their jurisdiction (40 C.F.R. § 233.2). In order to assume the Section 404 permitting program, a state must
 378 enact laws and regulations to create a program that meets requirements designed to ensure that the
 379 state can administer the Section 404 permitting program as the Corps. This process could be streamlined
 380 and could be incentivized for state assumption. States can play a greater role in the administration of the
 381 federal program and streamline permitting for developers in the state through State Programmatic
 382 General Permits. CWA Section 404(e) authorizes the Corps of Engineers to issue general permits "on a
 383 state, regional or nationwide basis for any category of activities involving discharges of dredged or fill
 384 material" if there are only minimal adverse environmental effects.

385 Local regulation of wetlands in addition to the state and federal programs have many benefits as well.
 386 Local decision makers have numerous land use tools available that can be more effective, and with less
 387 cost, protect sensitive landscapes valuable to their community such as with building permits, zoning
 388 authority, sanitary and health codes, and soil erosion control.

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390 D. Scalia Approach: Challenges and Opportunities

391 Local governments, in general, support a narrow interpretation of the Clean Water jurisdiction. The Scalia
 392 opinion applies a narrow interpretation to CWA jurisdiction. Such an interpretation would extend
 393 jurisdiction to only "relatively permanent, standing or continuously flowing bodies of water" connected to
 394 traditional navigable waters, and to "wetlands with a continuous surface connection to" such relatively
 395 permanent waters. The LGAC puts forth an approach that would yield categorical answers of jurisdiction
 396 of 'yes', 'no' or 'maybe' using criteria such as contained within the 2008 guidance and consistent with the
 397 Scalia approach.



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"We need to protect our streams and wetlands that are the water source for many of our communities, especially for our EJ communities now and for our future generations. And we need to engage EJ communities to look at local solutions."

Dr. Hector Gonzalez, M.D.

Local governments are also concerned about the assurances that water resources which provide (or potentially provide) our communities' drinking water and source water are regulated and protected. These significant waterbodies form the assets of our water infrastructure and these areas may or may not fall within the Scalia interpretation as "connected to a federal navigable waterway." Local governments would support States and Tribes assisting to identify these significant waterbodies by delineating and mapping these significant 'Waters of the State'. These areas once identified should have primacy in decision-making.

E. Exemptions

Exemptions for stormwater and green infrastructure are important for local government. Local governments would be supportive of a revised rule that would retain codification of the waste treatment exemption. It should also extend to MS4s, stormwater ponds, settling basins recycled water facilities which depend upon artificially created wetlands and storage ponds to treat millions of gallons of water a day. There has also been a major concern of county governments that roadside ditches are exempt. The revised rule should affirm that reservoirs along with influent and treated effluent storage ponds are within the scope of the waste treatment exemption, consistent with the regulatory definition of "complete waste treatment system" found in existing federal regulations including features such as storage ponds, basins, artificially created wetlands, recycled water reservoirs and other features associated with water recycling.⁶



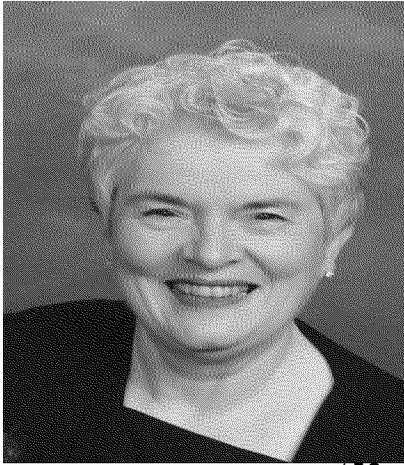
Arroyos are common geographic water features in the arid west. The examples in these photographs are non-permanent, ephemeral waters that only carry water during extreme precipitation events. This is an example of land structures which cause confusion under a one size fits all approach." Image Credit: Dripping Springs Road and Baylor Canyon Road Improvement Project Environmental Assessment, BLM & FHWA, April 2015.

F. Permitting Reform

CWA Section 404 permitting is complex and outdated. Agencies' budgets and staffing are overwhelmed and lack resources to respond to individual permits. At the same time, the private sector confronts time-consuming requirements that pose significant delays and economic burdens.

⁶ 1 See 40 C.F.R. §35.2005(b)(12), defining "complete waste treatment system" as "all the treatment works necessary to meet the requirements of title III of the [CWA], involving . . . the ultimate disposal, including recycling or reuse, or from the treatment process."

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**Commissioner Victoria Reinhardt
Ramsey County, MN**

"It's not just about getting a permit done quickly. It's about why you have the permit in the first place. As long as we keep in mind that it's about our environment, and it's about our water, we can implement that in any way we choose."

Commissioner Victoria Reinhardt, Ramsey County, MN.

Permitting can be made more efficient and more effective. For example, permitting length of time can be done more efficiently (less than 60 days) and it can also be more flexible, decentralized and integrated with community goals. Local governments would be generally in favor of State Assumption of the 404 program. Also, further consideration of General Permits and mapping would aid in permitting reform.

G. Agriculture and Rural Communities



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Fencing Livestock, Lexington, KY-Photo Source, Eric Vance, EPA

Agriculture and rural communities have expressed concerns about the Waters of the U.S. Most of the concern of the rule has been whether it would modify existing statutory provisions that exempt "normal farming and ranching" practices from dredge and fill permitting or others that exclude certain agricultural discharges, such as irrigation return flow and stormwater runoff, from all CWA permitting. The other key area of concern was the confusion whether or not ditches were exempt.